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Supreme Court of the United States

October Term, 1966
No. 709

McCULLOUGH TOOL COMPANY, *et al.*,
Petitioners,

vs.

WELLS SURVEYS, INCORPORATED, *et al.*,
Respondents.

Reply Brief in Support of Petition for Writ of Certiorari.

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Respondents' Brief avoids squarely meeting the issue raised in Petitioners' Petition. The Trial Court's Findings relate to novelty or anticipation, and utility under 35 U.S.C. 101 and 102.

There is a total absence of Findings of Fact relating to 35 U.S.C. 103, and the Trial and Appellate Courts did not consider the three factual inquiries required by *Graham, et al. v. John Deere Company of Kansas City, et al.*, and associated cases, 383 U.S. 1, 15 L. Ed. 2d 545, and did not make a determination as to whether or not "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains". (35 U.S.C. 103.)

What the Trial Court and Appellate Court did was to base their holdings of infringement on the fact that the Swift assembly produced a new or better result.

In Respondent's Brief, Respondent was unable to call to this Court's attention actual Findings on the three factual inquiries as required by *Graham, et al. v. John Deere, et al., supra,* but rather, referred to conclusionary findings, which, as pointed out in the Petition for Certiorari, do not even attempt to, nor were they prepared for the purpose of considering the real test under 35 U.S.C. 103, as required by the Supreme Court in the *Graham, et al. v. John Deere, et al.* and associated cases. The argument that the evidence was before the Court and that the Court must necessarily have considered the evidence and the factual inquiries of *Graham, et al. v. John Deere, et al.* is fallacious; and the Findings of Fact of the Trial Court and the Opinion of the Court of Appeals are the best evidence that these matters were completely overlooked and the decision of patentability based solely on new or better results.

Petitioner emphasizes again the necessity for a Writ of Certiorari which will be effective in causing the Tenth Circuit to comply with the law as laid down by this Court, and this is particularly true because if, in the pending case of *Well Surveys, Inc. v. Perfo-Log, Inc.,* Civil Action No. 9542, pending in the United States District Court for the Western District of Oklahoma, which involves the Swift patent the Court will

most likely follow the Tenth Circuit, and apply the false test of "new or better results" which the Court of Appeals for the Tenth Circuit in *Well Surveys, Inc. v. McCullough Tool* declares to be the law of that Circuit.

Granting of the Petition is respectfully solicited.

Respectfully submitted,

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